In the Supreme Court of the United States

OCTOBER TERM, 1957.

No. 53.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

WOOSTER DIVISION OF BORG-WARNER CORPORATION.

No. 78.

WOOSTER DIVISION OF BORG-WARNER CORPORATION,

Cross-Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR WOOSTER DIVISION OF BORG-WARNER CORPORATION.

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BRIEF FOR WOOSTER DIVISION OF BORG-WARNER CORPORATION.[1]

COUNTER-STATEMENT OF QUESTIONS PRESENTED.

In the course of collective bargaining between the Company and the Union, *during which it is conceded that the Company at all times was acting in good faith*, the Company advanced two *counter-proposals* in response to Union proposals originally made on the same subjects. The Company never, as the Board implies in its Brief, insisted upon

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[1] The time for filing this Brief was extended by order of the Clerk of this Court to and including October 14, 1957.

its counter-proposals as conditions precedent to the *execution of a written contract* incorporating agreement theretofore reached in the bargaining. This issue never arose because *no agreement was reached* until the Union authorized the signing of the contract finally executed. The facts are that the Company declined to separate the two counter-proposals in question from, and withheld and conditioned its agreement to, the many other proposals and counter-proposals with respect to wages, hours and other terms and conditions of employment involved in the bargaining unless the Union would accept the Company's counter-proposals in lieu of the Union's proposals on the same subjects.

The two counter-proposals not only are inaccurately described in the Board's Brief, but are misleadingly labeled as a "ballot clause" and a "recognition clause." They may more accurately be described, as they have been throughout the litigation below, as a "limited no-strike clause" and the "preamble clause." The latter clause might also be descriptively referred to as an "identification clause."

In response to an original Union proposal for a limited no-strike clause (G. C. Ex. 4, p. 26), the Company submitted its limited no-strike clause proposing that the Union agree that no strike should be called on any issue not subject to arbitration until after there had been a vote by secret ballot among all of the employees, both union and non-union, in the bargaining unit (G. C. Ex. 5 (c), R. 392a).

In response to the Union's original proposal that it identify itself in the preamble of the contract as "International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (U. A. W.-C. I. O.) and its Local Union 1239," the Company first advanced the counter-proposal that, in the preamble, the Union agree to identify itself in its local name, i.e., "Local Union

1239, affiliated with the International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (U. A. W.-C. I. O.)." After successive proposals and counter-proposals in the course of the bargaining, the Union's ultimate proposal was to identify itself as "United Automobile, Aircraft and Agricultural Implement Workers of America, Local Union No. 1239," while the Company's ultimate counter-proposal became "Local Union No. 1239, United Automobile, Aircraft and Agricultural Implement Workers of America" (R. 351a).

It is not denied that throughout the bargaining the Company, in fact, met and conferred with all of the representatives selected by the Union as the exclusive representatives of its employees and with no others. Moreover, no Company objection was ever made to the right of the Union's International representatives to approve the contract. In fact, the Company bargainer advised the Union representatives that the Company expected that the contract would be signed by International officers (R. 316a).

1. The question presented in No. 53, therefore, is whether the Company *per se* in violation of Section 8(a)(5) of the Act refused to recognize the Union or *per se* in violation of Section 8(a)(5) of the Act compelled the Union to agree to a provision outside the bargaining area prescribed by the Act, under circumstances where it is conceded that the Company (i) in fact bargained in good faith, (ii) in fact fully recognized the Union and no other as the exclusive representative, but (iii) conditioned the Company's willingness to agree to terms and conditions of employment upon the Union's agreement to the Company's no-strike counter-proposal in lieu of the Union's no-strike proposal.

2. The question presented in No. 78, therefore, is whether the Company *per se* in violation of Section 8(a)(5) of the Act refused to recognize the Union or *per se* in violation of Section 8(a)(5) of the Act compelled the Union to agree to a provision outside the bargaining area prescribed by the Act, under circumstances where it is conceded that the Company (i) in fact bargained in good faith, (ii) in fact fully recognized the Union and no other as the exclusive representative, but (iii) conditioned the Company's willingness to agree to terms and conditions of employment upon the Union's agreement to the Company's counter-proposal in lieu of the Union's proposal to identify the Union in the preamble to a labor contract by a name different from the name stated in the Board's certification.

COUNTER-STATEMENT OF THE CASE.

1. Bargaining Background of the Parties.

The Company is an unincorporated but independent division of Borg-Warner Corporation, operating a plant in Wooster, Ohio, a small town in a rural area (R. 168a, 239a). Another independent division of Borg-Warner Corporation, the Pesco Products Division, operates a plant in Cleveland, Ohio, in a large industrial area (R. 184a, 239a). The Company and Pesco make similar products (R. 185a).

The Union, having had labor contracts covering Pesco employees since 1944, commenced an organization campaign at the Company's plant in the Fall of 1952, in which the Union's local Pesco representatives took an active part (R. 239a, Resp. Ex. 2 and 13, R. 112a, 123a). Although the representation election was held before the Union chartered its local (R. 239a), the Union's pre-election promise to the Company's employees was that "you will have your

own charter, your own local union, your own contract and seniority, and officers elected from your own plant" (Resp. Ex. 2, R. 114a).

The consent election agreement, pursuant to which the election was conducted, was signed by the Union and approved by the Board, and expressly identified the Union simply as "UAW-CIO." The ballot used by the employees in voting likewise identified the Union simply as "UAW-CIO" (G. C. Ex. 3(a); R. 28a-30a). When the Union was certified as the bargaining representative, the Board's certification identified the Union simply as "International Union, United Automobile, etc., Workers of America, C. I. O." (G. C. Ex. 3-a-b-c, R. 25a-34a).

Before it opened the bargaining, the Union chartered its Local No. 1239 (R. 239a, 240a). The first Union proposals to the Company were delivered *by the Union's Local president*, and were denominated as *"Proposal of Local 1239*, U. A. W.-C. I. O., to Wooster Division of Borg-Warner Corporation" (R. 154a, 240a; G. C. Ex. 4, p. 8 and Schedule). The substantive terms of the proposal were determined by the local bargaining committee and based on the Pesco contract (R. 240a, 241a). Throughout the bargaining which followed, the Union sought to compel the Company, at Wooster, to accept the provisions of the Pesco contract. (See, e.g. R. 240a-241a; G. C. Ex. 9, 63; Resp. Ex. 2.)

2. The Counter-Proposals in Question.

A. The Limited No-strike Clause.

In the Union's original proposal, it submitted a limited no-strike clause (G. C. Ex. 4, p. 26). In response to the Union's proposed no-strike clause, the Company proposed a qualified no-strike clause: no strikes at all over arbitrable issues, but freedom to strike over non-

arbitrable issues after a specified procedure, culminating in a secret ballot, had been followed (G. C. Ex. 5-C, pp. 6-7; G. C. Ex. 11). (Contrary to the Board's claim, this was only a no-strike clause as the Argument, *infra*, shows.)

The Company's counter-proposal of the limited no-strike clause was not, in any way, a novel bargaining concept for this Union. In fact, the limited no-strike clause was patterned after an earlier contract made by this same Union with another Company. At the time the counter-proposal was made the Company bargainer advised the Union that he "had gotten it from another U.A.W.-C.I.O. contract (R. 319a, 320a).

Thus, the bargaining practice of this Union, as well as other unions, had included acceptance of similar and more restrictive no-strike clauses in contracts with other employers (R. 666-686; Resp. Ex. 29-36). There was never any suggestion in connection with this counter-proposal that non-union members should vote in Union meetings with respect to the strike questions (R. 259a).

The Union made only one no-strike proposal, the one contained in its first proposed contract (G. C. Ex. 4, p. 26).

B. The Preamble or Identification Clause.

The Board's certificate named the Union as "International Union, United Automobile, Aircraft and Agricultural Implement Workers of America." (G. C. Ex. 3-C; R. 33a). In its original proposal, the Union sought to identify itself as "International Union, United Automobile, Aircraft and Agricultural Implement Workers of America *and its Local Union No. 1239*," an obvious departure from the description of the Union in the Board's certification. Throughout a succession of proposals for its

identification in a contract preamble, the Union *never* omitted "Local Union No. 1239" from its proposals for a preamble (G. C. Ex. 4, 9; 350a-351a, 357a-358a).

The Company offered successive counter-proposals, seeking *Union agreement* "that the primary emphasis ought to be put on the Local representatives of the Union" in view of the fact "that the problems arose here [in Wooster]; that the people who were involved in those problems lived and worked here; that this was where any problems which arose ought to be settled [and] that the people down here were responsible people with whom it was most likely that we would deal" (R. 315a). Ultimately, the difference between the Company and the Union on this point was reduced to the Union proposing "United Automobile, etc., Workers of America, Local Union No. 1239," and the Company proposing "Local Union No. 1239, United Automobile, etc. Workers of America" (R. 350, 351a).

In the long history of bargaining between the same Union and the parent corporation's Pesco Division, the principal representatives of both Union and employer were the same bargainers who represented the Union and the Company respectively in the bargaining here involved (R. 239a, 228a). In the Pesco bargaining, despite the fact that the Board's certification described only the Local Union, the Union had insisted that it be described in the contract by both its International and Local names. It had carried this insistence to the point of strike in order to compel acquiescence on the part of the employer (R. 247a, 313a, 521a).

Further, the Union had a long established practice of bargaining with other employers with respect to the way in which it should be identified in its collective bargaining contracts. In some instances this identification was in its

international name, in others only in the name of its appliable local, and in still others in both names (R. 377a, 383a).

3. Control of Bargaining and Contract Administration Vested in Union's Locals by Its Constitution.

Membership in the International Union flows from membership in a Local union (G. C. Ex. 61, R. 89a). The right to vote in union conventions is restricted to delegates from Local unions who must be members of such Locals (G. C. Ex. 61, R. 90a). No Union representative has authority to negotiate the terms of any contract without first obtaining the approval of the Local Union. Even after negotiations have been concluded, the contract can become effective only after approval by a majority vote of the Local Union. Even national agreements are ineffective until ratified by the Local unions involved (G. C. Ex. 61, R. 91a, 92a).

The Union's International representatives are bound by contracts concluded out of conferences between Local unions and employers. Even when a grievance exists between a Local union and management, International representatives may participate only at the request of the Local Union, and then only when a Local committee is participating in all negotiations (G. C. Ex. 61, R. 90a, 91a). In the bargaining negotiations in question, the Union's International representatives expressly acted only on behalf of the Local bargaining committee (R. 240a, 241a).

4. The Concession That in the Advancement of its Counter-proposals and in All Other Respects the Company Acted in Good Faith in Fact Throughout the Bargaining.

Both in the hearing before the Trial Examiner and in oral argument before the full Board, the general counsel freely conceded that at all times during the bargaining the Company had acted in good faith in fact, and no claim to the contrary was ever asserted. This was recognized by the Trial Examiner (R. 389a), both the majority (R. 478a) and the minority (R. 490a) of the Board, and the Court of Appeals (R. 516a, 517a-518a).

5. The Facts That Throughout the Bargaining the Company at all Times Recognized, and Met and Conferred With the Union and no other, as the Exclusive Bargaining Representative of the Company's Employees.

There is no claim that the Company at any time failed, *in fact*, to comply with the requirements of Section 8(d) of the Act "to meet at reasonable times and confer in good faith" with the Union "with respect to wages, hours and other terms and conditions of employment." Nor is there any claim that, *in fact*, the Company failed at any time to recognize the Union for such purposes as "the exclusive representatives of all the employees" as required by Section 9(a) of the Act.

In the bargaining, the Company recognized, met and conferred with all representatives selected by the Union for the purpose. These included the Union's Local representatives and officers, its International representatives, one of its Regional Directors, an Administrative Assistant, its Publicity Director, and an official of its Borg-Warner Council (R. 152a, 153a). The Company did not recognize or meet or confer with anyone else.

6. The Recognition of the Trial Examiner, the General Counsel, the Board Majority and Minority, and the Court of Appeals, that the Company's Counter-proposals Were Legal to Make, Legal to Accept, and Legal to Include in a Collectively Bargained Labor Contract.

The trial examiner specifically found "that submission of the Company's proposals did not violate the act" (R. 431a), and that they could be "adopted if assented to" (R. 430a). The general counsel stated that he did "not contend that those propositions were matters that could not be proposed by the Company or that they were matters that the Union could not agree" to (p. 18, Report of oral argument before the Board). The majority of the Board found "that the respondent could make these proposals"; that they were "not in conflict with the provisions of the Act," and that the Union was entirely free to agree to the proposals (R. 479a). The Court of Appeals recognized the validity of this proposition in holding "that the designated bargaining agent is the party with whom the contract is to be made *unless it voluntarily relinquishes such right*" (R. 517a, 519a; emphasis supplied).

7. The Union Agreement to and Signature of a Labor Contract with the Company, at the Direction of the Union's Executive Board.

The ultimate execution of a collective bargaining agreement not only was consented to but was originally conceived and specifically directed by the Union's International representatives. This contract contained the last of the Company's several counter-proposals for description of the Union in the preamble and the Company's no-strike counter-proposal.

Four or five of the Union's International representatives summoned Local representatives and directed them "to recommend to the membership * * * that we end the

strike and go back to work" (R. 364a). The Union's Local president opposed this action (R. 364a). The Union's local representatives "didn't have any intention of going in and talking to the Company until the International called us * * * and asked us to talk the membership into going back to work" (R. 365a). Before the contract was signed it was approved by the Executive Board of the Union in Detroit (R. 362a, 363a, 375a).

8. The Continued Recognition of the Union and Administration of the Labor Contract.

The Union and the Company administered the contract throughout its life. This entire period was characterized by industrial peace in which the Company continued to give full recognition to the Union and to no other. Local and International representatives of the Union met and conferred with the Company on more than a dozen occasions (R. 368a). Dues and initiation fees were checked off, grievances were processed, and the Union carried at least one grievance to arbitration (Resp. Ex. 23, 24-A-J, G. C. Ex. 13, p. 6).

Bargaining in this period was not limited to administration of the labor contract; it extended to matters not covered by the contract as well. The Company agreed to expand the bargaining unit to include employees of another division which acquired manufacturing space in the Company's plant (R. 368a-370a). The seniority of the additional employees was established by agreement of the Union and the Company (R. 370a). The Company also bargained with the Union with respect to the latter's request for a wage increase, even though the labor contract did not contain a wage reopening clause (G. C. Ex. 13; R. 370a). Both International and Local representatives of the Union participated in the bargaining with respect to all of these matters (R. 368a-370a).

SUMMARY OF ARGUMENT.

This is a case of first impression, but the principles which control its decision have long been settled by this Court. Two questions are presented for decision. Both involve the power of the Board to apply *per se* tests of illegality to contract counter-proposals, neither of which, admittedly "is an illegal contract term" and neither of which has been charged or claimed to be "violative of an express provision of the Act." Cf. *N. L. R. B. v. American National Insurance Company*, 343 U. S. 395, 405 footnote 15.

The Board held that when the Company conditioned its tender of agreement as to terms and conditions of employment upon Union acceptance of the two counter-proposals in question in lieu of the Union proposals on the same subjects, the Company, as to each:

> (a) *Per se* refused to recognize the Union despite the facts that throughout the bargaining the Company admittedly acted in continued good faith and met and conferred with the Union, and no other, as the exclusive representatives of its employees; and
>
> (b) *Per se* refused to bargain because of the Board's view, again as a matter of law and without regard to the facts of this case, that both counter-proposals fell outside the bargaining area contemplated by the Act.

The Court of Appeals concurred with the Board only as to the counter-proposal involving the name by which the Union should be identified in the preamble clause of the contract and then for reasons differing from those of the Board. The Court accepted the Board's theory that the Company's position on this point resulted *per se* in a failure of Union recognition, and then concluded *ipso facto*

that the clause could not be within the bargaining area prescribed by the Act.

Both the Board and Court ignored this Court's repeated direction that the fundamental purpose of the Act is to foster *free* collective bargaining. "The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel." *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 45.

The only substantive limitation imposed by the Act upon the area of free collective bargaining is to exclude therefrom a proposal which "is an illegal contract term" or "violative of an express provision of the Act." And "the Board may not * * * sit in judgment upon the substantive terms of collective bargaining agreements." *National Labor Relations Board v. American National Insurance Company*, 343 U. S. 395, 404, 405, footnote 15.

"This inquiry must *always* be whether or not *under the circumstances* of *the particular case* the statutory obligation to bargain in good faith has been met." *National Labor Relations Board v. Truitt Manufacturing Co.*, 351 U. S. 149, 153-154. (Emphasis supplied.)

1. A PER SE VIOLATION OF THE ACT CANNOT RESULT FROM THE COMPANY'S GOOD FAITH CONDITIONING OF ITS AGREEMENT UPON ACCEPTANCE BY THE UNION OF COUNTER-PROPOSALS WHICH WERE NOT ILLEGAL AND DID NOT VIOLATE ANY PROVISION OF THE ACT.

The trial examiner, the Board and the Court of Appeals agreed that both counter-proposals were lawful to advance, lawful to accept, and lawful to include in a labor contract. No charge to the contrary was ever made.

In these circumstances, the Board's claim that a violation of Section 8(a)(5) resulted as a matter of law from advancement of the counter-proposals or conditioning the Company's agreement upon acceptance of them by the Union is not supported by the Act and is contrary to the decision of this Court in *NLRB v. American National Insurance Co.*, 343 U. S. 395.

In that case this Court squarely rejected any theory of *per se* violation of the Act's bargaining requirements, and expressly affirmed that a bargainer's compliance with his duty to bargain is to be tested only by the statutory test of good faith.

2. NO QUESTION OF RECOGNITION IS INVOLVED.

When the statutory test, rather than the Board's *per se* standard, be applied, no question of recognition is involved. The words "recognize" and "recognition" are not statutory words. They are simply shorthand expressions of the combined duty imposed by Sections 8(a)(5), 9(a) and 8(d) of the Act. The Act required only that the Company and the Union "meet and confer in good faith" with each other, the Company meeting and conferring with no other, with respect to questions arising in the bargaining area prescribed by the statute.

As this Court has so clearly stated, the statute "imposes upon the respondent [the Company] *only* the duty of conferring and negotiating with the authorized representatives of its employees" and "the negative duty to treat with no other." *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 44. (Emphasis supplied.)

Here, the Company's good faith is conceded and no suggestion is or can be made that the Court of Appeals was factually mistaken when it found that "in the present

case there was no attempt to bargain with the employees instead of the designated representatives. The Union was at all times recognized as the exclusive representative of the employees. The bargaining was done with it, not with the employees" (R. 517a).

So far as concerns recognition, the Company did all that the statute required. No greater duty can be exacted of it through some *per se* concept of legality engrafted upon the statute by the Board.

The Board concedes that both of the Company's counter-proposals were legal, and that neither contravened any express provision of the Act. It was conceded by the Board and the Court of Appeals, and is conceded here in the Board's Brief, that the counter-proposals were legal to make, legal for the Union to accept, and legal to include in a collective bargaining contract. Therefore, the Company's conditioning its agreement upon Union acceptance of the counter-proposals in lieu of the Union's proposals on the same subjects cannot be said to have constituted *per se* a failure of recognition of the Union or a violation of any provision of the Act.

3. BOTH COUNTER-PROPOSALS ARE WITHIN THE BARGAINING AREA PRESCRIBED BY THE ACT.

Both of the counter-proposals, when considered in the light of the facts of this case and not by a mechanical, arbitrary *per se* test, fall within the bargaining area prescribed by the Act. Any attempt to apply a rule by which any bargaining proposal or counter-proposal, "not violative of an express provision of the Act" can be declared illegal *per se*, frustrates rather than effectuates the policy of the Act. It completely disregards "the circumstances of the particular case," deprives the bargainers of "that free opportunity for negotiation" guaranteed by the Act, and

permits the Board to "sit in judgment upon the substantive terms of collective bargaining agreements" contrary to the theory of the Act.

The bargaining area of "wages, hours and other terms and conditions of employment, or the negotiation of an agreement," prescribed by the Act is not static, includes the right to bargain about the exceptional as well as the routine, and varies according to the bargaining practices of industry generally, those peculiar to a particular industry, and even those of special interest only to a particular employer and his employees.

Both Congress and this Court have been careful to preserve free collective bargaining from substantive governmental interference, whether by Congress, the Board, the Courts, or State regulation. In a system of free collective bargaining, determination of what subjects are or are not within the bargaining area prescribed by the Act must depend upon the good faith of the parties and the facts and circumstances of each particular case.[2]

In the light of (a) common practice of employers and unions generally to bargain about the names by which unions will be identified in collective bargaining contracts, with resultant agreement sometimes on an international name, sometimes on a local name, sometimes on both, and sometimes on a hybrid (b) the history of bargaining between this Union and other divisions of the present corporation over the subject, and (c) the history and background of the representation election in this case, the

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[2] "Under free collective bargaining the parties in each negotiation have the right to determine for themselves what subjects are to be dealt with jointly. This carries a risk that either party may resort to a strike or to a lock-out in order finally to resolve differences over the scope of collective bargaining." Dr. George Taylor, *Government Regulation of Industrial Relations*, p. 15 (New York, Prentice-Hall, Inc., 1948).

preamble clause in this bargaining clearly was within the bargaining area prescribed by the statute. This must be particularly true where, as here, no Union representative has authority, under the Union constitution, even to negotiate the terms of a contract without first obtaining the approval of the Local Union, and where no contract can become effective until after approval by the Local Union.

In the light of the fact that bargaining over an absolute no-strike clause is universally recognized to be within the bargaining area of the Act, bargaining over a limited no-strike clause must similarly be included. This is further emphasized in this particular case by the fact that this very Union had previously agreed to similar clauses in its collective bargaining contracts with other employers, and countless other unions had also agreed to similar clauses.

When it is remembered in connection with its counter-proposals, tha. the Company at all times met and conferred with the Union, and with no other, in admitted good faith, it must follow that the Company could not have been guilty of a failure to bargain collectively in good faith within the mandate of the Act.

ARGUMENT.

The difficulty with the approach of both the Board and the Court of Appeals to the case lies in their failure to appreciate the basic concept of the system of free collective bargaining prescribed by the Act. Here, as has too frequently has been the case before, the Board and the lower Federal Court, in their construction of the Act, have ignored the clear direction of this Court that the fundamental purpose underlying the Act is to foster *free* collective bargaining. It is no purpose of the Act to restrict such bargaining except as to those few matters which the Act, by express terms, makes illegal.

At the very threshold of this Court's interpretation of the Act it said:

> "The Act does not compel agreements between employers and employees. *It does not compel any agreement whatever.* It does not prevent the employer 'from refusing to make a collective contract and hiring individuals on whatever terms' the employer 'may by unilateral action determine.' * * * The theory of the Act is that *free opportunity* for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel." *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 45. (Emphasis supplied.)

Recently, in rejecting a contention of the Board very similar to that urged here, this Court was compelled again to remind those charged with responsibility for administering the Act that:

> "* * * the Board may not, either directly or indirectly, * * * sit in judgment upon the substantive terms of collective bargaining agreements." *National Labor*

Relations Board v. American National Insurance Company, 343 U. S. 395, 404.[3]

There being no coloration of bad faith here, correct decision of this case requires segregation of that conduct of the Company which it is charged resulted in a failure of Union recognition, and that conduct which it is claimed was an attempt to bargain on subjects outside the statutory bargaining area. The failure of the Board and Court below so to segregate the conduct and when so segregated to analyze it in the light of the actual language and requirements of the Act, produced their fundamental error.

By the application of a *per se* test of illegality, the Board found that both of the Company's counter-proposals, and the Court found that the preamble clause, could not be so bargained about as to be made a condition to the Company's agreement to terms and conditions of employment. Both Board and Court found the existence of illegality *per se* in what they apparently treated as a failure to recognize the Union arising *ipso facto* from the counter-proposals themselves.[4]

A careful examination of the Act itself and the duties which it imposes with respect to recognition and areas of bargaining respectively discloses, since there are no overtones of bad faith in this case, that actually no failure of recognition is involved at all. In fact, the only question

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[3] Moreover, "either party shall be free to decide whether proposals made to it are satisfactory." 343 U. S. 395, 403, footnote 10. And, as this Court suggested, free collective bargaining in good faith is limited only where a proposal "is an illegal contract term" or is "a clause violative of an express provision of the Act." 343 U. S. 395, 405, footnote 15.

[4] Thereby the Board disregarded this Court's admonition that "The inquiry must always be whether or not *under the circumstances of the particular case* the statutory obligation to bargain in good faith has been met." *N. L. R. B. v. Truitt Manufacturing Co.*, 351 U. S. 149, 153-154.

with which this Court must ultimately concern itself is whether or not conceding good faith and recognition as defined by the Act, the subject matter of the counter-proposals fell within the bargaining area specified in the Act.

Both the Board and the Court held that the question of the name in which a bargaining agent shall sign a contract, and the Board held that the question of the right of employees to express their views with respect to a strike before their bargaining agent calls it, are questions which *per se* are excluded from the bargaining area prescribed by the Act. It is the Company's position that the Act and the prior holdings of this Court preclude application of any rule of *per se* illegality by which the bargining area may be circumscribed. Rather, the proper rule by which bargaining subjects are to be tested is whether or not, under the facts of the particular case, they involved as a matter of fact and not of law, wages, hours, or other terms or conditions of employment, or the negotiation of an agreement within the meaning of these terms as they are used in the Act.

I. SINCE NEITHER COUNTER-PROPOSAL WAS ILLEGAL OR IN VIOLATION OF A PROVISION OF THE ACT, THE COMPANY'S GOOD FAITH CONDITIONING OF AGREEMENT UPON THEIR ACCEPTANCE CANNOT PER SE VIOLATE THE ACT.

The general counsel did not charge, and neither the Board nor the Court of Appeals held, that the counter-proposals were illegal or in violation of any express provision of the Act. On the contrary, the trial examiner, the Board, and the Court of Appeals agreed that the counter-proposals were lawful for the Company to advance, lawful for the Union to accept, and lawful for inclusion in a labor contract executed between the Company and the Union *as the exclusive representative* of the Company's employees.

In the light of such concession the Board's claim that a *per se* violation of the Act resulted from either the advancement of said counter-proposals or the Company's conditioning agreement upon their acceptance entirely fails of support in the Act.

This is not the first time that the Board has attempted to impose such a *per se* test upon this Court, accompanied by similar concessions of lack of illegality in the counter-proposals involved. In *National Labor Relations Board v. American National Insurance Company*, 343 U. S. 395, the Board also conceded that the counter-proposal under attack did not constitute "an illegal contract term" (p. 405) which this Court equated to a concession that the counter-proposal was not "a clause violative of an express provision of the Act" (p. 405, footnote 15).

The similarity to the position of the Board here with that rejected by this Court in *American National Insurance Company* further appears from the Court's characterization of the Board's position in that case in the following language:

> "Conceding that there is nothing unlawful in including * * * (such a) clause in a labor agreement, the Board would permit an employer to 'propose' such a clause. But the Board would forbid bargaining for any such clause when the Union declines to accept the proposal, even where the clause is offered as a counter-proposal to a Union demand * * *." 343 U. S., 395 at p. 408.

This Court rejected the Board's finespun theory of *per se* violation of the Act on the ground that "the Board was not empowered so to disrupt collective bargaining practices" (343 U. S. 395, at p. 408), and reaffirmed the fact that the rule by which the parties' conduct under the Act was to be measured was their good faith.

II. NO QUESTION OF RECOGNITION IS INVOLVED.

A. The Board and the Court of Appeals Confused the Requirements of the Act Relating to Recognition From Those Relating to Bargaining Area.

The Board, as to both counter-proposals and the Court of Appeals as to the preamble, misconceived the statutory requirements for Union recognition and confused them with the provisions of the Act respecting the bargaining area.

At the outset of its discussion, the Board majority stated that the Company's liability turned "upon the legal question of whether the proposals are obligatory *subjects* of collective bargaining," or stated differently, "permissible statutory demands" (R. 478a). But then the Board went on to support its decision by finding a violation of some unidentified provision of the Act with respect to so-called "recognition" of the Union's "status." The Board refers, without identification, to that "which requires an employer to recognize *a contract with the named certified representative*" (R. 481a, emphasis supplied). Again, the Board's opinion says that the advancement of the limited no-strike clause "is in derogation of the *status* of the statutory representative and thus violates the exclusive representation concept *embodied in the Act*" (R. 484a, R. 485a, Emphasis supplied).

No attempt is made by the Board majority to specify those provisions of the Act which it says require an employer to contract with a representative in the "name certified," nor any provision which proscribes any *bargaining subject* as a matter of law because it may relate to the way in which a Union may exercise its bargaining status. Nor does the Board specify any language "embodied in the Act," the concept of which it claims is violated.

The Court of Appeals similarly errs with respect to the preamble clause. The Court's position, however, presents the reverse side of the coin from that adopted by the Board. The Court says that the status of the Union to sign a labor contract, only in the *name* in which it is *certified*, "is acquired by statute" (R. 518a). In the next breath the Court recognizes, however, that "there is no specific provision to that effect" (R. 519a). As a result, the Court, to support its position, is driven to the finding that the "status," not "expressly acquired by statute," arises from some unexplained, clear implication.

In further confusion of the Act's requirements regarding recognition of representative status with those applicable to questions of bargaining area, the Court of Appeals says that the clear implication which it derives from the statute that a Union *must* sign a labor contract in the *exact name* which the Board uses in its certificate applies "unless it voluntarily relinquishes it" (R. 519a). Is the name in which a Union may sign a labor contract, then, a question of bargaining area, where proposals in regard to it may be accepted or rejected? Or, if the Court is correct that, as *a matter of law*, the name in which the Union is certified by the Board is an inviolable matter of status, excluded from the bargaining area, how may the Union legally act in derogation of such inviolable status through voluntary relinquishment?

B. The Statutory Mandate is Not to "Recognize" but Only to Meet and Confer with the Union as the Exclusive Representative of Employees.

The words "recognize" and "recognition" do not appear in the operative sections of the Act. The phrases "to recognize" or "accord recognition" to a union are simply shorthand expressions of the duty imposed by Sections

8(a)(5), 9(a) and 8(d). A combined reading of these Sections defines the entire duty of the employer as the duty:

> "to meet and confer in good faith with the representatives, as the exclusive representatives, selected by a majority of employees, with respect to (i) wages, (ii) hours, and (iii) other terms and conditions of employment, (iv) the negotiation of an agreement, and (v) any question arising under an agreement."

As this Court said in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 44:

> "The provision of § 9(a) that representatives, for the purpose of collective bargaining, of the majority of the employees in an appropriate unit shall be the exclusive representatives of all the employees in that unit, *imposes upon the respondent only the duty of conferring and negotiating with the authorized representatives of its employees* * * *." (Emphasis supplied.)

and again:

> "We said that the obligation to treat with the true representative was exclusive and hence imposed the negative duty to treat with no other."

C. Since the Company Met and Conferred Only with Representatives Designated by the Union, Always Accepting Such Representatives for the Purpose, as the Exclusive Representatives of its Employees, it Must Follow, as a Matter of Law, that No Question of Non-recognition Under the Act Can Arise.

The Company's good faith being conceded, the entire bargaining requirement imposed upon it by the Act was twofold:

(1) To meet and confer with the Union representatives as the exclusive representatives of the Company's employees;

(2) So meeting, to confer with them with respect to all matters falling within the bargaining area prescribed by the Act.

The representation mandate of the statute specifies those persons with whom bargaining must be conducted. It is only in the Act's specification of the bargaining area that there may be found definitions of or limitations on those matters which may be proposed, discussed, insisted upon or made conditions of agreement.

Representation questions can arise, therefore, only from a claim that the Company failed to comply with the first requirement, to meet and confer. The propriety or impropriety of subjects discussed while so meeting and conferring can arise only under the second requirement, which is the part of the Act which controls the legal bargaining area.

It is conceded that throughout the bargaining, the Company met and conferred exclusively with representatives of the Union. The Union itself chose those representatives. The Company never refused or attempted to evade its duty to meet and confer in good faith with those representatives as the exclusive representatives of the employees. The Board does not claim otherwise.

The Company complied entirely with this Court's declaration of "the negative duty to treat with no other." *Medo Photo Supply Corporation v. National Labor Relations Board*, 321 U. S. 678, 684. The Company never *questioned* the Union's exclusive authority to represent its employees. *Never did the Company do more than seek Union agreement* to the counter-proposals.

Even in the act of advancing and seeking the Union's acceptance of them, the Company fully recognized that only the Union—the exclusive representative—could

agree to them or reject them. As the Court of Appeals correctly found:

> "In the present case there was no attempt to bargain with the employees instead of the designated representatives. The Union was at all times recognized as the exclusive representative of the employees; the bargaining was done with it, not with the employees. Any requirement that the employees approve the action of the Union would be the result of an agreement with the Union to that effect." (R. 517a.)

There can be no claim, therefore, that the Company failed, in fact, to meet and confer with the Union representatives for the purposes required by the statute, or, in such meeting and conferring, failed to treat them as the exclusive representatives of the Company's employees.

D. Protection of the Exclusivity of the Union's representation Being as Much a Responsibility of the Union as the Company, the Finding of the Board and the Court of Appeals that the Union Could Legally Accept the Counter-proposals Eliminates Any Question of Recognition.

Recognition and protection of the exclusivity of the representative status of the Union was as much the responsibility under the Act of the Union as of the Company. It was an obligation and responsibility which the Union as much as the Company owed to the employees.

The Act not only guarantees *to employees* the right to designate or select their own bargaining representatives, but also provides assurance *to the employees* that their selectees or designees shall be "the exclusive representatives of all the employees (Sec. 9(a)). Further, the Union's right to compel bargaining by the Company (Sec.

8(a)(5)) and duty to respond to the Company's bargaining demands (Sec. 8(b)(3)) were only as "the representatives of his [its] employees, subject to the provisions of Section 9(a)," i.e., as "the exclusive representative[s]." Moreover, the Act specifically defines the bargaining obligation of the Company and the Union to have been "the *mutual* obligation of the employer and the representative" (Sec. 8(d)).

It must follow, *so far as concerns any question of recognition*, that if the advancement of a proposal or bargaining upon it with the Union constitutes a breach of the employer's duty to recognize the Union, or a derogation of the exclusivity of its representative status, its acceptance by the Union in bargaining must equally violate its mutual and reciprocal obligation to maintain the integrity and exclusivity of its representative status. Conversely, if acceptance of a proposal by the Union does not derogate its representative status, the advancement of or bargaining about the proposal by the Company cannot accomplish such derogation.

It must further follow that if the contract ultimately executed in this case was in derogation of the Union's representative status either because of the name in which the Union was identified in the preamble or because of the inclusion therein of the Company's limited no-strike counter-proposal, such derogation of the Union's representative status flowed as much from the Union's agreement to the clauses as from the Company's advancement thereof or bargaining with respect thereto. For that matter, if this be true then derogation of such status inhered equally in the Union's original proposal for a preamble.

The holding of the Board and the Court of Appeals that the counter-proposals were legal for the Union to

accept and include in a labor contract necessarily precludes the validity of any claim that advancing or bargaining about them by the Company resulted in any failure of recognition.

E. The Cases Cited in the Board's Brief in Support of its Position are Irrelevant Upon Their Facts.

Although the Board's Brief cites a long list of cases in support of its claims, none of them are relevant to the situation here before the Court. None of them supports the claim that the Act prescribes any standard for recognition other than the mandate "to meet and confer." None of them supports a concept of *per se* failure of recognition so long as Company and Union meet and confer in good faith. Practically all of them were rejected by this Court when previously urged upon it in support of a similar *per se* concept in *National Labor Relations Board v. American National Insurance Company*, 343 U. S. 395.

These precedents, for the most part, constitute *ad hoc* resolution of the controversies presented. Questions of good faith, the presence or absence of recognition, and the propriety or impropriety of bargaining subjects are frequently not segregated. Decisions are reached, not on careful analysis of what the language of the Act actually requires, but on varying theories of the bargaining results the authors believe the Act was designed to produce. Here, there is no dispute as to the good faith of the Company throughout the bargaining involved. This fact alone requires the rejection of much of the authority cited in the Board's Brief.

A brief summary of the actual holdings of the cases cited by the Board will serve to illustrate their inapplicability here. Most of them are cases wherein a breach of the duty to bargain was found to have resulted from a

failure in fact "to meet and confer." [5] Others involved situations "where a party bargained for a clause violative of an express provision of the Act," [6] such as an attempt to invade the statutorily protected jurisdiction of the Board to determine whether or not unfair labor practice charges should be withdrawn,[7] or a refusal to comply with the compulsory provision of the statute to execute a written contract incorporating any agreement reached,[8] or where the employer conditioned its willingness to meet and confer in

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[5] In this category fall *Medo Photo Supply Corporation v. N. L. R. B.*, 321 U. S. 678 (where employer granted a wage increase direct to employees); *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U. S. 342 (where employer made special wage arrangements individually with selected employees); *May Department Stores Company v. N. L. R. B.*, 326 U. S. 376 (where employer applied directly to War Labor Board for permission to raise wages without prior consultation with bargaining representative); *Brooks v. N. L. R. B.*, 348 U. S. 96 (where employer refused in fact to meet and confer with certified Union because of erroneous belief that Union no longer represented employees); *N. L. R. B. v. Louisville Refining Co.*, 102 F. 2d 678, certiorari denied, 308 U. S. 568 (where employer refused in fact to meet with Union and held conferences direct with the employees); *N. L. R. B. v. Aldora Mills*, 180 F. 2d 580, enforcing 79 N. L. R. B. 1 (where employer refused to admit the existence of the bargaining representative and, in fact, refused to meet and confer with anyone as the representative of its employees); *N. L. R. B. v. Griswold Mfg. Co.*, 106 F. 2d 713 (although employer was willing to meet with Union members as individuals, it refused to meet and confer with them as employee representatives); *N. L. R. B. v. Pecheur Lozenge Co., Inc.*, 209 F. 2d 393 (refusal of employer to meet and confer in fact because strike was in progress).

[6] *N. L. R. B. v. American National Insurance Company*, 343 U. S. 395, 405, footnote 15.

[7] *Lion Oil Co. v. N. L. R. B.*, 40 L. R. R. M. 2193; *Hartsell Mills Co. v. N. L. R. B.*, 111 F. 2d 291; *N. L. R. B. v. H. G. Hill Stores*, 140 F. 2d 924; *American Laundry Machine Co. v. N. L. R. B.*, 174 F. 2d 124.

[8] *H. J. Heintz Co. v. N. L. R. B.*, 311 U. S. 514; *N. L. R. B. v. Dalton*, 187 F. 2d 811; *N. L. R. B. v. Corsicana Cotton Mills*, 178 F. 2d 344.

fact or to execute a contract reflecting agreements reached upon something other than the Board's certification of the representative's capacity,[9] or where either the Union or the employer made a change in the unit designated by the Board pursuant to the statute a condition precedent to meeting and conferring,[10] or where the employer, after having reached agreement, refused the execution of a written contract incorporating such agreement unless the employees should approve the terms of the agreement.[11] The decisions in many of these and other cases cited by the Board were controlled by a finding by both the Board and the courts that bad faith existed in the totality of the employer's conduct.[12]

No case is cited by the Board in support of the proposition that when an employer admittedly, in continuing good faith, meets and confers with the representatives selected by the Union which has been designated as the exclusive

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[9] *Hill v. Florida*, 325 U. S. 538 (obtain Florida license); *N. L. R. B. v. Dalton*, 187 F. 2d 811 (qualify under Georgia law), and *N. L. R. B. v. George P. Pilling & Son Co.*, 119 F. 2d 32 (organize competitors of employer).

[10] *N. L. R. B. v. Retail Clerks International Association*, 203 F. 2d 165 (Union insistence on change in unit); *McQuay-Norris Mfg. Co. v. N. L. R. B.*, 116 F. 2d 748 (Company demand for change in unit); *Douds v. International Longshoremen's Association*, 241 F. 2d 278 (Company demanded change in unit); *N. L. R. B. v. Darlington Veneer Company, Inc.*, 236 F. 2d 85 (where Company sought to have unit depend upon continuation of check-off agreements).

[11] *N. L. R. B. v. Corsicana Cotton Mills*, 178 F. 2d 344.

[12] *N. L. R. B. v. Taormina et al.*, 207 F. 2d 251; *N. L. R. B. v. Aldora Mills*, 180 F. 2d 580; *N. L. R. B. v. Retail Clerks International Association*, 203 F. 2d 165; *N. L. R. B. v. Louisville Refining Co.*, 102 F. 2d 678 (refusal in fact to meet and confer with Union members as representative of employees, colored also by Court implication of bad faith); *N. L. R. B. v. Darlington Veneer Company*, 236 F. 2d 85 (where the Court concluded "the Board was fully warranted in finding that the Company had failed to bargain in good faith" at p. 90).

representative of its employees, and with no other, with respect to matters not violative of any express provision of the Act, but rather admittedly legal to propose, legal to accept and legal to include in a contract, the employer can, under any theory, be deemed *per se* to have denied recognition under the Act to the designated bargaining representatives of its employees.

No such case is to be found and no such position is tenable under the Act and this Court's decisions in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, and *National Labor Relations Board v. American National Insurance Company*, 343 U. S. 395.

F. There Being No Question of Recognition Involved the Sole Issue is Whether or Not the Company's Counter-proposals Fell Outside the Bargaining Area of the Act.

It is apparent from the foregoing that so far as any *statutory requirement* is concerned, full recognition was given by the Company and the Union acting as the exclusive representative of the Company's employees, each to the other. It must follow that the legality or illegality of the Company's counter-proposals, whether it be determined as a matter of law by some *per se* test, or as a matter of fact, flows from their appraisal in the light of the bargaining area requirements of the Act. The question before this Court, therefore, is whether or not, as the Board started out to determine, "the proposals are obligatory subjects of collective bargaining" within the bargaining area prescribed by the Act. No other question is presented.

III. BOTH OF THE COMPANY'S COUNTER-PROPOSALS ARE INCLUDED WITHIN THE BARGAINING AREA PRESCRIBED BY THE ACT.

The theory of the Board, and of the Court of Appeals so far as concerns the preamble clause, that the Company's counter-proposals, *as a matter of law*, lay outside the bargaining area prescribed by the Act, flies squarely in the face of the following rules plainly stated by this Court:

(1) "Congress provided expressly that the Board should not pass upon the desirability of the substantive terms of labor agreements. Whether a contract should contain a clause * * * is an issue for determination across the bargaining table, not by the Board." *National Labor Relations Board v. American National Insurance Company*, 343 U. S. 395, 408-409; and

(2) "Each case must turn upon its particular facts. The inquiry must always be whether or not under the circumstances of the particular case the statutory obligation to bargain in good faith has been met." *National Labor Relations Board v. Truitt Manufacturing Co.*, 351 U. S. 149, 153-154.

A. The Purpose of the Act is to Preserve Collective Bargaining Free from Substantive Governmental Interference, Whether by Congress, the Board, the Courts, or the States.

"The theory of the Act is that free opportunity for negotiation [13] * * * is likely to promote industrial peace

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[13] "Under free collective bargaining, designating the terms and conditions of employment is a private matter for a union and a management to work out between themselves in whatever way they see fit and particularly without government interference.

"Substance has to be given to the rather formal statement just suggested. That can best be done by noting the three most important aspects of the joint dealings between labor and management that are worked out in free collective bargaining. They

and may bring about the adjustments and agreements which the Act in itself does not attempt to compel." *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 45.

The Act "does not undertake governmental regulation of wages, hours, or working conditions. * * * So far as the Act itself is concerned these conditions may be as bad as the employees will tolerate or be made as good as they can bargain for. The Act * * * *does not authorize anyone* [14] to fix generally applicable standards for working conditions." (Emphasis supplied.) *Terminal Railroad Association v. Brotherhood of Railroad Trainmen*, 318 U. S.

(Continued from preceding page)

are determinations of (1) the scope of the labor agreement, (2) negotiating procedures, and (3) substantive contract terms. All three aspects are vital parts of the relationship. Resolution of differences in each one of these areas is looked upon as a private matter to be worked out by a union and a management under a system of free bargaining. Legislation dealing with any one of these areas constitutes a substitution of government directive for collective bargaining." Dr. George Taylor, *Government Regulation of Industrial Relations*, p. 14 (New York, Prentice-Hall, Inc., 1948), p. 10.

"As I view the present scene, perhaps the greatest of all dangers to free collective bargaining is the proneness of both sides to seek the aid of government to give them the victory in their contests with each other." Presidential address by Edwin E. Witte, Chairman of the Department of Economics of the University of Wisconsin at the annual meeting of the Industrial Relations Research Association at Cleveland, Ohio, December 29, 1948.

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[14] "In collective bargaining, there is but one way—note, one way only—for determining the conditions of employment. That is by an agreement between the management and organized employees. * * * The strike and the lockout have definite functions to perform. They are accepted devices for resolving the most persistent differences arising in an employment relationship where differences must be resolved by agreement." Dr. George Taylor, *Collective Bargaining in Defense Economy*, Annual Meeting of the Industrial Relations Research Association, Chicago, Illinois, December 28-29, 1950, p. 4.

1, 6, approved *National Labor Relations Board v. American National Insurance Company*, 343 U. S. 395, 402, footnote 8.

In its opinion in *National Labor Relations Board v. American National Insurance Company*, this Court emphasized the care which Congress has taken to insure that neither the Board nor the Congress itself should attempt to set "itself up as the judge of what concessions an employer must make *and of the proposals and counter-proposals that he may or may not make*" (p. 404). (Emphasis supplied.) In rejecting an effort by the House in the Hartley Bill to enact specific substantive definitions of the bargaining area, "the good faith test of bargaining was retained and written into § 8(d) of the National Labor Relations Act" (*Id.* p. 404).

Similarly, this Court has held that the states are without power to impose substantive controls over the bargaining, the enactment of which the Congress has been zealous to avoid. *International Union of United Automobile, Aircraft and Agricultural Implement Workers of America, C. I. O. v. O'Brien*, 339 U. S. 454.

B. The Bargaining Area is not Susceptible of Precise Definition as a Matter of Law, but Rather Varies From Industry to Industry and Case to Case.

The Court of Appeals, in holding that the limited no-strike clause fell within the bargaining area, recognized that:

> "The bargaining area of the Act has no well-defined boundary. The phrase 'conditions of employment' has not acquired a hardened and precise meaning. Management and labor are now required to bargain collectively about issues which formerly were not considered as proper issues for inclusion in the usual bargaining agreement." (R. 516a, 517a.)

"Wages," "hours," "terms" or "conditions" of employment, and the "negotiation of an agreement" as used in the Act do not describe a static and confining bargaining area by which good faith bargaining may be circumscribed.[15] On the contrary, the Board and the Courts have always recognized their extension to a broad range of subjects limited only by good faith and the facts and circumstances surrounding the particular bargaining involved.

The term "wages," for example, has been interpreted not narrowly to refer to rates of pay, but broadly to include pensions and other benefits. *Inland Steel Co. v. National Labor Relations Board*, 170 F. 2d 247. The term "conditions of employment" has a "broader meaning than that perhaps spontaneously suggested by the term 'working conditions'." *Inland Steel Co.*, 77 N. L. R. B. 1, 7.

Collective bargaining is not restricted "to those subjects which up to 1935 had been commonly bargained about in negotiations between employers and employees." *W. W. Cross & Co., Inc. v. National Labor Relations Board*, 174 F. 2d 875, 878. Collective bargaining is "to be used irrespective of the fact that the specific differences to be adjusted had not previously been considered in the framing of collective bargains." *Inland Steel Co.*, 77 N. L. R. B. 1, 9. "Effective collective bargaining has been generally conceded to include the right * * * to bargain about the excep-

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[15] "But as the parties always bargain within the context and history of their relationship, the question as to what should enter bargaining must be decided case by case, and rests with the parties. In other words, the content of bargaining must itself remain subject to bargaining rather than be governed by rigid rules laid down by others. The demand to negotiate about a particular subject at a particular time may lead to a compromise of the parties between this demand and other substantive demands." Petshek, *Research on Extent and Scope of Collective Bargaining*, at p. 229, Report of Fifth Annual Meeting of the Industrial Relations Research Association, Chicago, Illinois, December 28-29, 1952, p. 229.

tional as well as the routine * * *." *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U. S. 342, 347. "Common collective bargaining practice" and the "traditions of bargaining" of a particular industry or union must be considered in appraising the broad scope of bargainable subjects. *National Labor Relations Board v. American National Insurance Co.*, 343 U. S. 395, 407.

The Board itself has consistently recognized the bargaining practices not only of a particular industry but even of a *particular employer*.[16] Thus in *Matter of Weyerhaeuser Timber Company*, 87 N. L. R. B. 672, the Board said in footnote 1 at p. 673:

> "We have previously rejected, with the approval of the courts, the similar argument that 'conditions of employment' has no broader meaning than that perhaps spontaneously suggested by the term 'working conditions,' and that it therefore only refers to the physical conditions under which employees are compelled to work rather than to the terms or conditions under which employment status is afforded or withdrawn. * * * (We have) held that the lease of company-owned houses to employees, which apparently was done simply as a convenience for the employees, constituted a condition of their employment within the meaning of the Act." (87 NLRB 672, 673 n. 1.)

The relevance and importance of historical and industry bargaining practices, were emphasized by the Board in these words:

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[16] "In fact, the National Labor Relations Board generally has recognized some subjects as proper bargaining matter only after some unions and employers in previous cases had agreed to bargain on them." Petchek, *Research on Extent and Scope of Collective Bargaining*, at p. 229, Report of Fifth Annual Meeting of the Industrial Relations Research Association, Chicago, Illinois, December 28-29, 1952, p. 229.

"There is also evidence in the record that there has been collective bargaining in the industry with respect to other matters relating to room and board, such as health certificates for cookhouse employees and bedmakers, proficiency of cooks, quantity and quality of food, cleanliness and capacity of bunkhouses, types of beds, the number of persons to eat at a table, and the number of persons that one waitress should serve." (87 NLRB 672, 677 n. 14.)

In answer to the employer's defense "that no lumber companies in the area have ever had contracts covering the price of either room or board," the Board summarily replied:

"the record discloses that there has been bargaining concerning the price charged for board and room *not only by other large lumber concerns* in the States of Washington and Oregon, *but also by the Respondent itself with another local of the Union at the respondent's Longview Branch.*" (87 NLRB 672, 676.)

C. Under the Circumstances of This Case the Preamble Clause to Identify the Union in the Name of Its Local Fell Within the Bargaining Area Prescribed by the Act.

1. The preamble clause directly affected working conditions and the negotiation of an agreement.

Experts in the field long have recognized that the relative importance of Local and International representatives of a Union, in given negotiations or in the administration of a contract, bears directly upon the relationship of an employer and his employees, and thereby upon the stability and character of actual working conditions. Thus, Mr. Joel Seidman of the University of Chicago, in discussing the importance with respect to working conditions of Local Union influence and predominance in contract administration, said:

"One of these [situations] is the plant of moderate size in which an industrial-type union operates, in which typically the officers work in the plant and do their union work on a spare-time or lost-time basis. * * * Here the formal union meeting remains the official way of bringing membership needs and desires to the attention of union officers; but union stewards and top local officers work alongside their members, listening to their comments and complaints, and forming part of an informal plant society that strongly influences decisions made at the formal union meeting." Reports of the Fifth Annual Meeting of the Industrial Relations Research Association, Chicago, Illinois, December 28-29, 1952, at pp. 153-154.

At the same meeting Mr. Albert S. Epstein, representing the International Association of Machinists Union, suggested an example of how remote the International officials of a large industrial union may be from actual knowledge of the working conditions of a small plant in rural Ohio, such as that of the Company, when he said:

"A dramatic example of concentration is that of the UAW, which has almost one-third of the CIO's membership. Half of the UAW's membership is located in Michigan and half of that membership is centered in Detroit." (p. 234.)

No one with even a superficial knowledge of the practical facts of collective bargaining in industry can fail to know that whether or not a labor contract is negotiated and administered by Local Union representatives or International Union representatives, has a direct causal effect on the working conditions which will result in a plant covered by such agreement. Typical examples of situations where such effect on working conditions is pronounced are found in questions involving management's

right to subcontract work, or to make technological changes.[17]

Experienced bargainers know that not only the substantive terms of a labor agreement and the working conditions resulting therefrom, but also the very negotiation of the agreement itself, are substantively affected by whether, in the course of Union negotiations, the Union emphasizes representation by its Local, International, or intermediate representatives. An American labor leader has commented upon this phenomenon as follows:

> "The most dramatic and obvious result of the shift to bigness has been in the collective bargaining process itself. * * * There can be no doubt that there have been changes in the type of bargaining and *in the content of the bargain*. The Automobile Workers and the Steelworkers offer most obvious examples. * * * As the process is removed further from local plants and local unions, the bargaining takes on a less personal character, and tends to become more of a pageant or drama. * * * The role of the union negotiator himself has undergone subtle but fundamental changes. * * * He may even be able to remove the uncertainty from management's position in private conversation, and to re-define his own functions as one of 'selling' a settlement to 'the people.' " George W. Brooks of the International Brotherhood of Pulp,

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[17] "There is no point at which the national and local leadership are likely to be more sharply differentiated in their opinions than on this issue. Local union members are always uneasy about, and usually opposed to, technological change although this opposition is not serious in periods of high level employment. The national union, on the other hand, is likely * * * to understand that technological progress is always progress for the members as a whole and almost always for each of the members." George W. Brooks, *Reflections on the Changing Character of American Labor Unions*, at pages 42-43 of Reports of Meeting of Industrial Relations Research Association, Cleveland, Ohio, December 28-29, 1956.

Sulphite & Paper Mill Workers, *Reflections on the Changing Character of American Labor Unions*, pp. 39, 40, delivered at the meeting of Industrial Relations Research Association, Cleveland, Ohio, December 28-29, 1956.

It is clear that the view of Mr. Brooks has and must have its counterpart in management.[18] Since emphasis on Local Union representatives in the bargaining may produce "changes in the type of bargaining and in the content of the bargain," it must follow that when parties, in admitted good faith are bargaining about the name in which the Union should identify itself, they are discussing matters within the bargaining area of the Act affecting terms and conditions of employment and the negotiation of an agreement.

2. The Board's certificate cannot be held, as a matter of law, to foreclose bargaining concerning the way the Union will be named in a labor contract.

It is the Board's theory (Brief, p. 37), that the name it used in its certificate to identify the Union effectively excluded both the Company and the Union from the right

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[18] "For instance, it takes a brave labor lawyer today to assure his client that almost any subject is outside the area of required bargaining. Unions once confined their bargaining under a quite limited concept of wages, hours and working conditions. This concept has constantly broadened.

"This trend has at times alarmed management. For instance during the 1945 Labor-Management Conference the labor delegates refused to enter into any agreement regarding matters which should be protected as management functions. The labor delegates said: 'The experience of many years shows that with the growth of mutual understandings the responsibilities of one of the parties today may well become the joint responsibility of both parties tomorrow.'" William B. Barton, General Counsel, United States Chamber of Commerce, *Major Trends in American Trade Union Development 1933-1955*, at page 38, as reported in the Annual Proceedings of Industrial Relations Research Association, 1955 meeting at New York City.

to engage in free collective bargaining about the way in which the Union should be identified in any labor contract. This theory is inconsistent with the purposes of the Act, and is in derogation of the designation of a representative actually made by the Company's employees.

Nowhere does the Act provide that the Board's certificate shall serve as a substantive limitation upon the right of the Company and the Union *freely* to negotiate within the bargaining area which it prescribes. Since the preamble proposal involves no question of recognition, the compulsion of the Act upon Company and Union to bargain about "the negotiation of an agreement," as well as about "terms and conditions of employment," clearly negates such concept. The Board's contrary conclusion, then, is just another example of an effort to amend the Act by the application of administrative gloss.

Nowhere in the statute is the right given to the Board to designate or select the employees' representatives for the purpose of collective bargaining. By Section 9(a) of the Act such right is the exclusive perquisite of the employees. "Representatives designated or selected * * * by a majority of the employees * * * shall be the exclusive representatives of all the employees."

The Board is empowered to do no more than perform the act of providing an identifying name for the representative *so designated* by the employees. The Board's power is, only, to "direct an election by secret ballot and * * * certify the results thereof." The real question therefore must be—what was the representative actually designated by the employees?

Immediately preceding the representation election, and as an inducement to the Company's employees to select the Union as their bargaining representative, they were told by the Union:

"You will have your own charter, your own Local Union, your own contract and seniority, and officers elected from your own plant. We, in the U.A.W.-C.I.O. are proud of the autonomy and independence of our Local unions working for our general benefit within the framework of the U.A.W. and the C.I.O." (Resp. Ex. 2, R. 114a.)

The ballot by which the Company's employees expressed their preference did not even contain the name, "International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, C.I.O." as a bidder for their suffrage. The ballot designated the Union merely as "U.A.W.-C.I.O." This designation was approved by the Union and the Board, and was incorporated in the Consent Election Agreement pursuant to which the Board conducted the election. (G. C. Ex. 3(a), R. 28a-30a.)

The Board's naming the Union in its International name cannot be deemed *ipso facto* to have restricted the designated Union, i.e., U.A.W.-C.I.O., to its International representatives to the exclusion of any other representatives it might agree to, or to a contract identification of the Union only in its International name.

It has long been the established rule of the Board that the only function of its certificate "is to ascertain and certify to the parties the name of the bargaining representative," and that in a representation proceeding it is not the Board's "function to direct, instruct or limit that representative as to the manner in which it is to exercise its bargaining agency." *General Aniline & Film Corp.*, 89 N. L. R. B. 467, 468; *St. Regis Paper Company*, 104 N. L. R. B. 411; *Bendix Products Division, Bendix Aviation Corporation*, 77 N. L. R. B. 1372; *Wilson Packing & Rubber Co.*, 51 N. L. R. B. 910.

If further emphasis were needed for the proposition that the employees designated the U.A.W.-C.I.O. as a whole and not merely its International representatives, it is to be found in the following provision of the Union's own constitution, which presumably was known to the employees:

> "No * * * International officer or International representative shall have the authority to negotiate the terms of a contract or any supplement thereof with any employer without first obtaining the approval of the Local Union." (G. C. Ex. 61, R. 91a.)

Under the facts of this case, it is to close one's eyes to reality to accept the narrow legal effect ascribed by the Board and the Court of Appeals to the particular words which the Board happened to use in its certificate.

3. The name in which a Union shall be identified in a labor contract has been accepted as a subject within the bargaining area by this Union and by employers and unions generally.

The Union, not the Company, opened the bargaining about preamble identification of the Union by a description different from the Board's certificate. The Union proposed that it be identified in both "international" and "local" names, although the Board had used only the former. The Union *never* proposed any description or identification of itself which did accord with the Board's certificate.

This case does not mark the Union's first bargaining on this subject. This Union was accustomed to agree to describe itself in a variety of ways in labor contracts. In its contracts with other employers, the Union has sometimes agreed to describe itself in its "international" name, sometimes in its "local" name, and sometimes in both (R. 377a, 379a, 381a, 382a-383a; see also Bureau of National

Affairs, *Collective Bargaining Negotiations and Contracts*, Sec. 20:301).

The Company's representative at the bargaining table in this case had previously had personal experience with this "common collective bargaining practice" [19] of this Union. At the Pesco Division of Borg-Warner, the Board's certificate identified the Union simply in the name of its Local Union No. 363. But there, the *same Union negotiator*, in bargaining with the same negotiator who represented the Company here, insisted that the Union be identified in both "international" and "local" names, notwithstanding the Board's certificate. In that instance the Union's demand for departure from the Board's description was so insistent that the Company was forced to capitulate to avert a strike (R. 247a, 313a, 521a).

The "practice" of the Union to bargain about this subject only reflected the generally recognized interest of employers and unions in the subject of how a union shall be identified or described in a labor contract, and their general practice to bargain about it.[20]

The practice varies widely. The Steelworkers Union, for instance, prefers to identify itself only in its "international" name. The Teamsters and Operating Engineers,

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[19] *N. L. R. B. v. American National Insurance Co.*, 343 U. S. 395, 407.

[20] "Some employers prefer to have the national or international union made a party to the contract together with the local union in the belief that enforceability of the agreement is thereby strengthened. At the same time, parent organizations sometimes insist on being made party to contracts negotiated by their locals in order to retain a proprietary interest in the contract under any conditions.. However, the passage of the 1947 Labor Law has inspired some international unions to avoid becoming party to contracts lest they then become liable for court damages in the event of violations." (Bureau of National Affairs, *op. cit.*, Vol. 2, Sec. 70:11.)

on the other hand, follow a preference for the "local" name or some hybrid such as "Central States Drivers' Council." (See, e.g., Bureau of National Affairs, *op. cit.*, Sec. 27:753; CCH Labor Law Reporter, Vol. 5, Par. 59,908.)

The point is that, long before this case arose, both sides of the table, in the course of free collective bargaining, had placed the manner in which unions are to be identified in labor contracts within the bargaining area of the Act. Whether potential liability under Section 301 of the Act, or pattern bargaining, or encouragement of local responsibility, or predominance of national union policy, or any one of many other considerations, influences one party or the other to prefer a "local" to an "international" description, or vice versa, or both, the realistic fact of modern collective bargaining is that employer and union bargainers commonly bargain about this subject.[21]

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[21] This, like many other bargaining subjects, is related to the administration of the contract. It is a rare negotiation that does not involve this and many similar subjects such as: (i) the size and composition of bargaining and grievance committees. (ii) Whether or not and if so upon what conditions "international" union representations will have access to the plant, or participate in the grievance procedure. (iii) Whether or not and if so on what terms an employer will enforce compulsory union membership, or check off union dues, or grant leaves of absence for Union local or international business, or give "super-seniority" to union officers or representatives, or permit or pay for union meetings, processing of grievances, etc. on company time, or provide union bulletin boards in the plant, or permit distribution of union literature in the plant, or exempt the union from liability for strikes or violations of the labor contract. See, for example, G. C. Ex. 13, *Labor Contract*, pp. 4, 5, 6, 12, 21, 24; G. C. Ex. 4, pp. 1, 2, 9-11, 13, 15-16, 22-26; Bureau of National Affairs, *Contract Clause Finder*, Sections 60:124-127, 62:301-302, 361-364, 65:241-245, 301-304; Bureau of Labor Statistics, Bulletins No. 908-6, p. 32 (1948); No. 908-12, pp. 31-32, 35-36, 44-45 (1949); No. 908-13, pp. 2, 7, 76-77 (1949); No. 908-19, pp. 2-11-12 (1950).

D. Under the Circumstances of This Case, the No-strike Counter-proposal Fell Within the Bargaining Area Prescribed by the Act.

This Brief (pp. 22-31) has already demonstrated that the no-strike counter-proposal did not involve any question of recognition. There remains the Board's claim, rejected by the Court below and by the Court of Appeals for the Seventh Circuit in *Allis-Chalmers Mfg. Co. v. National Labor Relations Board*, 213 F. 2d 374, that the no-strike clause was outside the bargaining area prescribed by the Act. This claim, too, is opposed to the Act, the decisions, and the realities of collective bargaining.

1. Absolute no-strike clauses fall within the bargaining area and no provision of the Act prohibits conditional no-strike agreements.

Both the Board and this Court have recognized that no-strike clauses unconditionally prohibiting all strikes clearly fall within the bargaining area of the Act. *Shell Oil Co.*, 77 NLRB 1306; *Bethlehem Steel Co.*, 89 NLRB 341; *National Labor Relations Board v. American National Insurance Co.*, 343 U. S. 395, 408, note 22. Such holdings clearly effectuate the purpose of the Act to avoid or minimize "strikes and other forms of industrial strife or unrest." If Union agreements to preclude strikes entirely effectuate the purpose of the Act, how can a Union agreement which only attaches conditions to the Union's right to call a strike be said to frustrate it? [22]

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[22] "It is the purpose and policy of this Act * * * to protect the rights of individual employees in their relations with labor organizations * * *." (Sec. 1 (b) Labor Management Relations Act.) This was recently referred to by Boyd Leedom, Chairman of the National Labor Relations Board, as one of the Act's "often overlooked and sometimes forgotten purposes." Address, Missouri Bar Association, September 26, 1957.

The qualified no-strike clause proposed by the Company was one which this Union and many other unions had recognized as proper for inclusion in collective bargaining agreements long before this case arose (R. 32a, Resp. Ex. 29-36, R. 145a-149a). By the Company's counter-proposal the Union's freedom to call a strike was not eliminated as it would have been under an unqualified no-strike clause. Rather, the Union was left *free to call a strike* once it had complied with the specified procedure.

It is not claimed by the Board that the Company's counter-proposal "is an illegal contract term" or "violative of an express provision of the Act." Cf. *N. L. R. B. v. American National Insurance Co.*, 343 U. S. 395, 405, note 15. Rather, the Board seeks here also to apply a *per se* test of illegality completely *aliunde* any provision of the Act.[23]

2. The counter-proposal was a no-strike clause which sought only Union agreement that no strikes would be called until a specified procedure, ending with a vote of the employees, had been followed.

The Company's counter-proposal was only a no-strike clause, despite the Board's epithetical argument which characterizes it as a "ballot" clause. The clause was contained in a proposed Article which dealt with lockouts and strikes. In material part, it provided simply that:

> "The Union agrees that there will be *no strike* * * * with respect to any (matter upon which an impartial arbitrator has no jurisdiction to rule) *until the procedure hereinafter set forth in this Article has been exhausted.*" Sec. 5.5(a); G. C. Ex. 11, R. 59a; Emphasis added.

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[23] The failure of Congress in 1947 to require a vote of employees before a strike, contrary to the Board's contention (Brief, pp. 20-22), proves simply that Congress thought this was a matter better left for solution by free collective bargaining.

The remainder of the Article set forth the procedure to be followed *before a strike could be called with respect to any issue,* including *a strike* over the issue whether or not the agreement should be amended, modified or terminated (G. C. Ex. 11, R. 59a-60a).

This Article had no application whatever unless the Union desired to call a strike. No procedure was required and no vote of employees was exacted under any other circumstances. The Company never claimed anything more for the no-strike counter-proposal, never sought Union agreement to anything more, and was never understood by the Union to be seeking anything more than a qualified no-strike clause. (See G. C. Ex. 9, No. 3, R. 55a; Resp. Ex. 18, R. 130a; R. 252a-263a, 349a-350a, 355a-357a.)

The Union was left free to take any *position* on any issue, with or without consultation with the employees, as the Union might determine. It was limited only in respect of its freedom to call a strike. For that matter, even if employees voted *not* to strike, the Union was *still free* to take any position on the issue it chose. The Union was even free to call a strike contrary to the vote. Nothing in the Company's counter-proposal bound the Union to abide by the result of the vote in any way.

The Company's qualified no-strike clause left the Union free to follow any *procedure* of its own it might choose to follow. It merely required that the procedure specified by the Company be followed too. The Union was completely free, for example, to arrive in its own membership meeting at the conclusion to strike and thereafter to make this known and recommended when the secret ballot was taken among all employees.

3. The Board's claim that the Counter-proposal interferes with internal Union affairs is without legal significance under the facts of this case.

The Board's condemnation of the no-strike counter-proposal (Brief, pp. 29-30) on the ground that it interfered with internal Union affairs (whatever this means) is without legal significance here. The Company already has shown that "recognition" was not involved in the counter-proposals. The Act does not make either the Union's or the employer's "internal affairs" as such immune from bargaining.

The counter-proposal could not involve internal union affairs unless the Union agreed to it. The Board's contrary suggestion ignores the Union's statutory right simply not to agree. The Company had no way to impose its counter-proposal on the Union if the Union chose not to accept it. In essence, the Company only proposed in good faith that the Union agree not to call a strike during the life of the labor contract without first submitting the question of strike or no strike to the employees. How and whether the Union decided to agree to this proposal was left entirely to the Union.

In any event, the extent, if any, to which the counter-proposal interfered with internal Union affairs, even after the Union's agreement to it, does not take the question out of the bargaining area of the Act any more than does the total interference which results from Union agreement to an unconditional no-strike clause. Whatever mechanics, if any, the Union may have for calling a strike or polling its constituents, an unqualified no-strike clause places a total restraint on the use of any "internal procedure" so far as strikes are concerned. Both the Board and this Court have recognized that the total interference resulting from

an unqualified no-strike clause does not remove the subject from the bargaining area of the Act.

The Company's qualified no-strike clause left the Union free to follow any procedure of its own it might choose to follow. It merely required that the procedure specified by the Company be followed too. The Company did not propose to intrude in the Union's internal affairs, and made this clear to the Union in the course of the bargaining. The Union, for its part, was not really concerned about this for it proposed to accept the Company's no-strike clause if the Company would agree to compulsory Union membership for all employees (R. 353a, 358a-359a).

The Board's condemnation (Brief, p. 29) that the no-strike counter-proposal tested "the statutory representative's power to call a strike" may or may not be an accurate statement of the consequence but on either view is also without legal significance. The naked refusal of an employer in good faith to grant a wage increase "tests" the Union's "power to call a strike." Any failure or refusal of an employer in good faith to meet any Union demand "tests" the same power. This is the essence of the free collective bargaining fostered by the Act.

4. No-strike provisions, qualified by a secret ballot, had been placed within the bargaining area of the Act by this Union and by employees and unions generally before this case arose.

On the subject matter of strikes, too, the Union *not* the Company opened the bargaining. From the Union's first proposal to the end of the bargaining, the issue was *what,* not *whether,* limitations should be placed on the Union's freedom to call a strike.

This, too, was consistent with the Union's "common collective bargaining practice," both at the Pesco Division of Borg-Warner and with other employers as well. In fact, the Union's proposed no-strike clause was patterned after its agreement at Pesco, and the Company's counter-proposal was patterned after the Union's no-strike clause at Allis-Chalmers (G. C. Ex. 4, p. 26; R. 221a, 319a-321a).

This Union's no-strike agreement with Allis-Chalmers, for example, was even more sweeping than the no-strike clause proposed by the Company. There the Union had agreed that there would be no strike, even after the labor contract had expired, unless there had been a secret ballot by the employees and unless the employees had approved the strike. (The Union there had gone even farther than this, because it had also agreed that elections of local union officials would be conducted by secret ballot of union members on the company's premises.) See R. 378a-380a.

As in the case of the name by which the Union shall be identified in the contract, a no-strike clause like the Company's counter-proposal is anything but a stranger to the area of collective bargaining commonly covered today by representatives of employers and employees. To name only a few, the Auto Workers (both AFL and CIO), the Farm Equipment Workers, the Electrical Workers (both CIO and IND.), the Electricians, the Patternmakers, the

Firemen and Oilers, the Plant Guard Workers, the Packinghouse Workers, the Furniture Workers, the Shoe Workers, the Carpenters, and the Woodworkers, have agreed upon no-strike clauses which required a secret ballot (*and in some cases approval*) by the employees before the Union was free to strike. (See R. 382a, Resp. Ex. 29-36, R. 145a-149a.)[24]

CONCLUSION.

"The Act does not compel any agreement whatsoever between employees and employers * * * The theory of the Act is that the making of voluntary agreements is encouraged * * * by imposing on labor and management the mutual obligation to bargain collectively * * * (The) Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements. * * *

"The Board offers in support of the portion of its order before this Court a theory quite apart from the test of good faith bargaining prescribed in Section 8(d) of the Act, a theory that (the Company's) * * * bargaining for (its preamble and no strike clauses) as a counter-proposal to the Union's demand (on the same subjects) * * * was, '*per se*,' a violation of the Act.

"Counsel for the Board do not contend that (either of the Company's counter-proposals) * * * is an illegal contract term. As a matter of fact, a review of typical contract clauses collected for convenience in drafting labor

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[24] "* * * A review of typical contract clauses collected for convenience in drafting labor agreements shows that * * * clauses similar in essential detail to the clause proposed * * * have been included in contracts negotiated by national unions with many employers." *NLRB v. American National Insurance Co.*, 343 U. S. 395, 405.

agreements shows that * * * clauses similar in essential detail to the (clauses proposed by the Company) * * * have been included in contracts negotiated by national unions with many employers * * * (It) is manifest that bargaining for (such clauses) is common collective bargaining practice.

"The Board considers that employer bargaining for (such clauses) * * * is an unfair labor practice because it is 'in derogation of' employees' statutory rights to bargain collectively as to conditions of employment. Conceding that there is nothing unlawful in including (the Company's counter-proposals) * * * in a labor agreement, the Board would permit (the Company) * * * to propose (them) * * *. But the Board would forbid bargaining for any such clause when the Union declines to accept the proposal, even where the clause is offered as a counter-proposal to a Union demand * * *.

"If the Board is correct, an employer violates the Act by bargaining (for such clauses) * * * without regard to the traditions of bargaining in the particular industry or such other evidence of good faith as the fact in this case that (the Company's clauses were) * * * offered as a counter-proposal to the Union's (proposals on the same subjects) * * *. The Board's argument is a technical one for it (must be) * * * conceded that (the Company) * * * would not be guilty of an unfair labor practice if, instead of (making its counter-proposals) * * *, it simply refused in good faith to agree to the Union proposal * * *.

"The Board was not empowered so to disrupt collective bargaining practices * * *. The duty to bargain collectively is to be enforced by application of the good faith bargaining standards of Section 8(d) to the facts of each case rather than by prohibiting all employers in every in-

dustry from bargaining * * * altogether (for clauses like the Company's counter-proposals)." *NLRB v. American National Insurance Co.*, 343 U. S. 395, 402, 404, 405, 407, 408, 409.

"Accepting * * * the finding (and concession) * * * that (the Company) bargained in good faith," the judgment in No. 53 should be affirmed and the judgment in No. 78 should be reversed.

Respectfully submitted,

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